

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
JIANGUO ZHOU

DETERMINATION
DTA NO. 830056

for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
Period January 26, 2017.

Petitioner, Jianguo Zhou, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period January 26, 2017.

A videoconferencing hearing via CISCO WebEx was held on September 28, 2022, with briefs to be submitted by February 13, 2023, which date began the six-month period for issuance of this determination. Petitioner appeared by Law Office of Xian Feng Zou (William X. Zou, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was in possession or control of unstamped cigarettes so as to be liable for the penalty imposed pursuant to Tax Law § 481 (1) (b) (i).

FINDINGS OF FACT

1. On January 26, 2017, petitioner, Jianguo Zhou, sold unstamped cigarettes to an undercover source for the Queens County, New York, District Attorney's Office (Queens DA),

for \$5,000.00.¹ Once petitioner accepted the money from the source, he returned to his 2017 Toyota Sienna, opened the trunk, and retrieved the unstamped cigarettes. When he did this, members of the Criminal Investigation Division Cigarette Strike Force of the Division of Taxation (Division), along with United States Postal Inspectors, United States Food and Drug Administration Investigators and the Queens DA Investigators, apprehended petitioner. When petitioner was apprehended, unstamped cigarettes were visible through the trunk of his vehicle. His vehicle was transported to the Queens County DA, and a search warrant was requested and obtained for the vehicle. While executing the search warrant, the investigators found 236 cartons of unstamped cigarettes. The vehicle was registered to petitioner's wife.

2. The cigarettes were itemized on form EN-651, Office of Tax Enforcement Property Receipt/Release (EN-651), under voucher number 29044. The EN-651 listed the cigarette cartons that were confiscated, totaling 236 cartons of unstamped cigarettes.

3. On February 8, 2018, in the Criminal Court of the City of New York, Queens County, New York, as a result of the seizure, petitioner plead guilty to disorderly conduct and agreed to pay \$10,000.00 in restitution. The Restitution Agreement for the criminal proceeding provided that, as partial payment of the \$10,000.00, petitioner assigned and forfeited \$3,115.60 that was seized pursuant to the search warrant. The Restitution Agreement also provided "[t]his restitution will be forwarded to the appropriate taxing authority, but does not in anyway [sic] bind such authorities from seeking any additional redress." Petitioner made his final restitution payment on May 24, 2018, for a total amount of restitution paid of \$9,995.00. The Division found this amount fully satisfied the restitution required.

¹ In the Report of Investigation of this transaction petitioner is referred to as "Zhou, Guo."

4. Candy Lin, a former auditor with the Division, calculated the amount of civil penalty using the information obtained during the criminal investigation. She determined the civil penalty by applying a \$600.00 per carton penalty to 231 cartons (236 cartons seized minus 5 cartons), for a total penalty of \$138,600.00.

5. On March 21, 2019, the Division issued to petitioner a notice of determination, assessment number L-049556999 (notice), assessing a penalty in the amount of \$138,600.00. The notice provided that the penalty was imposed because petitioner was in possession of 236 cartons of untaxed cigarettes on January 26, 2017.

6. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. A conciliation conference was held on December 6, 2019, and on October 23, 2020, BCMS issued a conciliation order (CMS. No. 000309553) sustaining the notice.

7. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on October 30, 2020. In the petition, petitioner asserted that he was arrested and charged for the sale of the unstamped cigarettes and that such charge was resolved with a restitution payment in the amount of \$13,115.60 that petitioner paid to New York State. He also alleged that because the 236 cartons of cigarettes that were seized were unsold, there should not be any sales tax imposed.

8. At the hearing, Gregory Aurigemma, a senior excise tax investigator, testified for the Division. Mr. Aurigemma has been a senior excise tax investigator for 17 years and has investigated over 300 cases involving sales and distributions of untaxed cigarettes. Mr. Aurigemma testified that he supervised a team of five investigators that had been asked by other state and federal agencies to get involved in the investigation and surveillance of petitioner. He

testified that when he and the other investigators executed the search warrant for the vehicle, they examined each carton and determined that they were not taxed.

CONCLUSIONS OF LAW

A. New York State imposes an excise tax of \$4.35 per pack of 20 cigarettes on “all cigarettes possessed in the state by any person for sale” (Tax Law § 471 [1]). An affixed cigarette tax stamp serves as proof that such tax was paid (*id.*). Possession of more than 400 cigarettes in unstamped or unlawfully stamped packages by any person other than an agent or distributor, is presumptive evidence that such cigarettes are subject to the tax and the burden is on the person in possession to prove otherwise (*see* Tax Law § 481 [2] [a]).

B. A penalty of up to \$600.00 per carton may be imposed for every two hundred cigarettes (i.e., a carton), or fraction thereof, in excess of one thousand cigarettes (five cartons) “in unstamped or unlawfully stamped packages in the possession or under the control of any person” (Tax Law § 481 [1] [b] [i]). For petitioner to be liable for the penalty imposed, the unstamped cigarettes must have been in his possession or under his control (*see Matter of Kamal*, Tax Appeals Tribunal, February 11, 2010).

C. Here, it is undisputed that petitioner was in possession and control of unstamped cigarettes. He does not dispute that 236 cartons of unstamped cigarettes were seized from the vehicle. He only argues that paying the restitution in the criminal matter fully satisfied all claims against him and that because he did not sell the unstamped cigarettes, no sales tax should be due.

Petitioner’s argument that he should not be subject to the penalty pursuant to Tax Law § 481 (1) (b) (i) because he did not sell the untaxed cigarettes is rejected. The Tax Law places a tax on all cigarettes possessed within the state (*see* Tax Law § 471). “Possession or control itself, with or without intent to sell, is sufficient for the imposition of penalty” (*see Matter of*

